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COURT OF APPEALS

STATE OF NEW YORK

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POLICE BENEVOLENT ASSOCIATION OF THE  
CITY OF NEW YORK,

Appellant,

-against-

No. 82

CITY OF NEW YORK,

Respondent.

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20 Eagle Street  
Albany, New York  
October 19, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

STEVEN A. ENGEL, ESQ.  
DECHERT  
Attorney for Appellant  
1095 Avenue of the Americas  
New York, NY 10036

ANTHONY P. COLES, ESQ.  
DLA PIPER  
Attorney for Appellant  
1251 Avenue of the Americas  
New York, NY 10020

RICHARD DEARING, ESQ.  
NEW YORK CITY LAW DEPARTMENT  
Attorney for Respondent  
233 Broadway 5th Floor  
New York, NY 10007

Jacqueline H. Portillo  
Official Court Transcriber



1 CHIEF JUDGE WILSON: The first case on the  
2 calendar is Number 82, Police Benevolent Association v.  
3 City of New York. Counsel.

4 MR. COLES: Thank you, Your Honor. Tony Coles  
5 along with Steve Engel for the Appellants. And may it  
6 please the court, I'd like to reserve two minutes for  
7 rebuttal?

8 CHIEF JUDGE WILSON: Yes.

9 MR. COLES: Under the diaphragm provision of  
10 Section 1081, it is legal for an officer to sit, kneel, or  
11 stand on the torso of a suspect while effectuating an  
12 arrest even if that impairs breathing, unless the suspect's  
13 diaphragm is compressed.

14 But the major huge flaw in the statute is there  
15 is no way that an officer can determine whether or not a  
16 suspect's diaphragm is being compressed, much less a  
17 prosecutor, weeks or months later, or another officer on  
18 the scene with a duty to intervene.

19 JUDGE GARCIA: So let's say the encounter is not  
20 fatal, but there is the activity you describe, forget the  
21 diaphragm, but the activity you describe. How does a  
22 prosecutor prove that?

23 MR. COLES: I don't think a prosecutor can prove  
24 that because the ultimate knowability of whether or not the  
25 diaphragm can be compressed is not something that you

1 actually could tell.

2 JUDGE GARCIA: Isn't that a proof issue and not a  
3 vagueness issue?

4 MR. COLES: No, it - - - it - - - it - - - the -  
5 - - the - - - it's actually a very core due process issue  
6 for cops, for police officers, because it does not tell  
7 them when what is lawful conduct in effectuating an arrest  
8 crosses the line from enforcing the law, protecting the  
9 public - - -

10 JUDGE CANNATARO: What about the fact that  
11 officers are trained about the existence of diaphragms,  
12 where they're located, how they work? Doesn't that provide  
13 them with the requisite knowledge that what they're doing  
14 could involve compression of the diaphragm?

15 MR. COLES: Well, could involve compression of  
16 the diaphragm is not the standard in the statute. Knowing  
17 the anatomy of where the diaphragm is does not tell you  
18 whether or not the diaphragm is being compressed.

19 CHIEF JUDGE WILSON: Let me ask if you're sort of  
20 reading the words in the manner that - - - out of the  
21 statute. That is the statute could've been read - - -  
22 written to say - - - sorry - - - sitting, kneeling, or  
23 standing - - - sorry - - - compresses the diaphragm by  
24 sitting, kneeling, or standing. But it doesn't say that.  
25 It says, sitting on or standing on the chest in a manner



1 that compresses the diaphragm. So there's a way to read  
2 it, I think, that talks about the manner rather than the  
3 effect.

4 MR. COLES: There is no way of determining the -  
5 - - the - - - the consequence to the diaphragm. From - - -

6 CHIEF JUDGE WILSON: No, I know - - - that - -  
7 that's actually - - - that's sort of asking what in a  
8 particular case happens to the diaphragm. But there's a  
9 way to read it as outlawing certain manners of sitting,  
10 kneeling, or standing that have the tendency to compress  
11 the diaphragm regardless of whether they do in a particular  
12 case or not.

13 MR. COLES: Right, but - - - if - - - but the  
14 basic phrase compressing the diaphragm is still not  
15 something that's knowable.

16 CHIEF JUDGE WILSON: That's true but it - - -  
17 ways that - - - matters - - - matters to of - - - to  
18 compress the diaphragm might be knowable; that is you can  
19 say, here are the following ways of sitting or standing or  
20 kneeling on someone that are likely to compress the  
21 diaphragm, and that would be things that are in the manner  
22 of compressing the diaphragm whether it's actually  
23 compressed or not.

24 MR. COLES: That doesn't give any notice to an  
25 officer as to when the diaphragm might, in fact, be

1 compressed. And it is the compression of the diaphragm  
2 that leads to the impairment of breathing that it, in  
3 theory, creates the crime.

4 CHIEF JUDGE WILSON: Well - - -

5 MR. COLES: So - - - so - - - the - - - the - - -  
6 the diaphragm itself, according to the unrebutted record  
7 for the trial court, is something that is not normally a  
8 compressible muscle. It is below the ribcage. It is below  
9 the liver.

10 JUDGE RIVERA: Is there a way to restrict the  
11 flow of air or blood by - - - I'm sorry, let me just get  
12 the language exactly - - - that's by sitting, kneeling, or  
13 standing on the chest or back which is unrelated to the  
14 diaphragm?

15 MR. COLES: A - - - a - - - absolutely.

16 JUDGE RIVERA: Okay.

17 MR. COLES: And Dr. Lettieri addresses that in  
18 the record. And - - - and that's part of the problems over  
19 here. I - - - I - - - is you can actually squeeze the chest  
20 and compress the chest, then that will make it difficult to  
21 breathe. You can squeeze the lungs and that will make it  
22 difficult to breathe. There are - - - a suspect may  
23 actually be out of breath and that would make it difficult  
24 to breathe.

25 JUDGE RIVERA: But then if that is the case,

1 would you not know then, if you're not doing it that way,  
2 right, in ways that are not above the diaphragm, that the  
3 other ways are above the diaphragm. It is by process of  
4 elimination that an officer would understand.

5 MR. COLES: Well they - - - they - - - they may  
6 or may not be above the diaphragm, because you can't  
7 actually touch the diaphragm. In other words, the - - -  
8 the - - - the diaphragm is protected by the ribcage. It is  
9 within the thoracic cavity.

10 CHIEF JUDGE WILSON: I'm not sure that I'm  
11 reading the statute the same way you do. There are - - -  
12 there are two clauses, the, beginning in a manner, and, in  
13 a manner, and I would read those as parallel. And the,  
14 restricts the flow of air, is in the first, in a manner.  
15 And the second, in a manner, doesn't have anything about  
16 the restriction of the airflow. It just says, what's  
17 prohibited is restraining an individual in by - - -  
18 sitting, kneeling, or standing on the chest or back in a  
19 manner that compresses the diaphragm. That's it. There's  
20 nothing about airflow there.

21 MR. COLES: Right, but it has to be something  
22 that will result in compressing the diaphragm.

23 JUDGE RIVERA: Could I - - - could I just confirm  
24 that is your reading? Because that was not my reading. So  
25 I just want to know what - - - what you are saying is the

1 correct reading of this statute.

2 MR. COLES: My view of the correct reading of the  
3 statute is that the statute requires proof that the  
4 diaphragm was compressed. And that is an unknowable event.

5 JUDGE RIVERA: No, no, I'm asking about this  
6 first part. "No person shall restrain an individual", and  
7 then it says, "in a manner that restricts the flow of air  
8 or blood." Do you think that part, in a manner that  
9 restricts, only applies to the chokehold, or applies to  
10 both a chokehold and the diaphragm compression?

11 MR. COLES: I think that applies to both, Your  
12 Honor.

13 JUDGE RIVERA: Okay.

14 MR. COLES: I have to say applies to both  
15 provisions.

16 JUDGE SINGAS: It's not the word, compress. You  
17 don't have an issue with the word, compress. It's the  
18 phrase, compress the diaphragm, right? Because compress is  
19 in the chokehold ban.

20 MR. COLES: Th - - - th - - - that's actually a  
21 great question. Th - - - th - - - this is - - - the issue in  
22 this case is not what does compress mean or what does  
23 diaphragm mean. It means is it knowable for an officer  
24 effectuating an arrest to know when the diaphragm is being  
25 compressed. And the answer to that, unrebutted in the

1 record is, he can't.

2 JUDGE HALLIGAN: So Counsel - -

3 MR. COLES: He can't see the diaphragm.

4 JUDGE HALLIGAN: It seems to me that this is a  
5 little of an unusual vagueness challenge, because a lot of  
6 times I think statutes that are declared void for vagueness  
7 have a particularly subjective standard, like, annoying,  
8 for example. What's the best case for you, would you say,  
9 that involves what I take it to be - - - it's sort of a  
10 scientifically unknowable fact, and therefore, unduly  
11 vague.

12 MR. COLES: Oh, I - - - I - - - I think that the  
13 core standard that we have in People v. Burke. It is the -  
14 - - the - - the statute has to give fair notice to a  
15 police officer when he actually is committing a crime. And  
16 - - - and - - and since it is unknowable when you're  
17 making an arrest as to when the diaphragm is compressed, he  
18 is - - - the statute itself is void for vagueness. And - -  
19 - and - - -

20 JUDGE TROUTMAN: So it's not enough to be clear  
21 that you're directed not to engage in certain conduct in  
22 those areas. You have to actually know that the scientific  
23 application of what happens to the diaphragm.

24 MR. COLES: I'm - - - I'm - - - I'm glad you  
25 asked that question, because both the Appellate Division

1 and the city tried to rewrite the statute. They - - - they  
2 - - - they actually, in a way, throw in the towel in trying  
3 to explain how you can know when the diaphragm is  
4 compressed. You know, the city below said, well, you just  
5 don't have to - - - just avoid sitting, kneeling, or  
6 standing on the suspect. Well, that's not what the statute  
7 says. That's a different statute.

8 JUDGE RIVERA: Yeah, but I don't think, unless  
9 I've misunderstood the Chief Judge's question, I'm not  
10 sure you've answered his question, which his question was  
11 regardless of whether or not there's an actual compression  
12 of the diaphragm, is the prohibition on doing something,  
13 based on what has already described as sitting, kneeling,  
14 or standing on the chest or back, that would under perhaps  
15 normal circumstances compress the diaphragm? Whether you  
16 do or don't.

17 MR. COLES: No. My - - - my - - - my view of  
18 the statute is you actually have to compress the diaphragm  
19 in order to violate the statute. I think that is clear.  
20 Now I just - - - just what the Appellate Division said, the  
21 Appellate Division said, well, we don't really know how you  
22 can compress the diaphragm, so we're going to rewrite the  
23 statute to talk about putting pressure in the vicinity of  
24 the diaphragm. The vicinity, that - - - that - - - that  
25 could be between the hip and the shoulder. It could be

1 between the waist and the knee, and it doesn't shed light  
2 on the core question of, how do you know that the diaphragm  
3 is compressed when you can't see it, when it's normal  
4 operation? Actually, doesn't involve compression, its  
5 normal operation is to flatten and then expand. And the  
6 statute does not actually say it's illegal to interfere  
7 with the operation of the diaphragm; it says the - - -  
8 illegal to compress.

9 JUDGE RIVERA: Let me, let me ask - - - is there  
10 - - - is there - - - is there within the medical community,  
11 an understanding of what - - - what would - - - what would  
12 be the kind of action, the manner that would compress a  
13 diaphragm? That's - - - you're saying that's completely  
14 unknowable? Putting aside whether in actuality the  
15 diaphragm is compressed.

16 MR. COLES: It's actually a terrific question.  
17 And the evidence, unrebutted before the trial court, it is  
18 that a police officer cannot tell when the diaphragm is  
19 being compressed. You can tell - - - unless he had a  
20 fluoroscope or x-ray vision. There is no external way - -  
21 - like, if you're pressing on the neck - - -

22 JUDGE GARCIA: What if you're kneeling in an area  
23 you know the diaphragm to be, generally, and the person is  
24 having trouble breathing? Doesn't that give you some  
25 indication you might be compressing the diaphragm in a

1 manner that restricts airflow?

2 MR. COLES: Well, the - - - the - - - the  
3 evidence below is - - - is that doesn't necessarily mean -  
4 - - the compressing of the diaphragm doesn't mean that  
5 you're interfering with the operation of the diaphragm.

6 JUDGE CANNATARO: Granted, you may not be.

7 MR. COLES: But that's - - -

8 JUDGE GARCIA: Yeah, but that's the only way that  
9 you violate the statute - - - I - - - if you agree with the  
10 Chief Judge's interpretation on the provision, it has to be  
11 in a way that restricts airflow.

12 CHIEF JUDGE WILSON: No, no, other way around.

13 MR. COLES: No it - - - it's - - -

14 CHIEF JUDGE WILSON: I think the airflow only  
15 applies to the chokehold.

16 JUDGE RIVERA: Yeah, I'm the one who thinks that  
17 - - -

18 JUDGE GARCIA: Then I agree with Judge Rivera.

19 MR. COLES: Okay. But I also want to go back to  
20 that. Because the - - - because the Appellate Division  
21 talked about that a little bit, as well. And - - - and -  
22 - - and I think what the Appellate Division said is an  
23 indication that the statute is void. The - - - the  
24 Appellate Division said, well, sometimes you have to make a  
25 reasonable estimation. But the evidence in this case

1 doesn't support that. And a reasonable estimation of  
2 pressure in the vicinity of the diaphragm is such loose  
3 language that it simply doesn't give fair notice.

4 JUDGE RIVERA: But the whole - - - isn't the  
5 intent of this provision to prevent the unfortunate death  
6 from asphyxiation? The whole point is to avoid the  
7 terrible, horrible outcomes that were going on at the time  
8 and continue to go on. So isn't it obvious then that it's  
9 - - - it's not about compressing the diaphragm in sort of  
10 the abstract, it's the consequence of that.

11 MR. COLES: So - - - the - - - the - - - and - -  
12 - and - - - and absolutely, you know, everyone sees the  
13 need and the reason for that statute. But this statute  
14 actually doesn't accomplish that.

15 JUDGE RIVERA: What could have saved it?

16 MR. COLES: I don't know that anything - - -  
17 well, I don't know that anything could save this particular  
18 statute.

19 CHIEF JUDGE WILSON: Well, I thought you're  
20 saying, maybe I misunderstood, that if you struck the  
21 words, in a manner that compresses the diaphragm, the  
22 statute would be valid.

23 MR. COLES: Well, yeah - - - but it - - - but you  
24 would rewrite the statute.

25 CHIEF JUDGE WILSON: Right.

1 MR. COLES: Yeah, yeah. Yes, I - - - I guess  
2 what I was suggesting - - - before is that the - - - the  
3 city council needs to revisit this. This whole - - -

4 JUDGE RIVERA: No, but my question was if they're  
5 trying to achieve the goal, as I think you set up before,  
6 which is not to prohibit sitting, kneeling, or standing on  
7 the chest or back when attempting or effectuating an  
8 arrest. They're not completely barring that kind of  
9 action.

10 MR. COLES: Right.

11 JUDGE RIVERA: Then what would save this statute?

12 MR. COLES: Okay. Well, they're - - - they're  
13 not even barring it if you impair breathing. It's only in  
14 the very limited circumstance that you compress the  
15 diaphragm. I - - - I - - - I don't think there's anything  
16 that would save this statute the way it's written now.

17 The - - - the - - - the city below, you know,  
18 tried to save it by saying that it should be limited or  
19 should be rewritten to preventing or prohibiting police  
20 officers from kneeling, sitting, or standing on the torso  
21 of a suspect.

22 JUDGE RIVERA: Full stop.

23 MR. COLES: Period. Period.

24 JUDGE RIVERA: What if they defined diaphragm and  
25 or compression?

1 MR. COLES: I'm sorry?

2 JUDGE RIVERA: What if they defined diaphragm and  
3 or compression?

4 MR. COLES: They - - - they - - - they actually  
5 haven't. And - - - and - - - again - - -

6 JUDGE RIVERA: But what I'm saying, and its - - -  
7 let's say we agreed with you. But they still were  
8 concerned about this - - - the consequences, the fatal  
9 consequences of the action they are trying to do something  
10 about it.

11 MR. COLES: I think the evidence in this case  
12 indicates that regulating around what happens to the  
13 diaphragm is not a comprehensible way of dealing with an  
14 impairment of breathing.

15 CHIEF JUDGE WILSON: Alright, thank you. You  
16 have your rebuttal.

17 MR. COLES: Okay. But thank you very much, Your  
18 Honors. Appreciate it.

19 MR. ENGEL: May it please the court. Steven  
20 Engel, on behalf of the Patrol - - - the Patrol Officers  
21 Benevolent Association of the City of New York. I'd like  
22 to reserve two minutes of my time.

23 CHIEF JUDGE WILSON: Yes.

24 MR. ENGEL: I think what the court has been  
25 wrestling here is the fundamental indeterminacy of this

1 phrase, compresses the diaphragm. There's no question that  
2 there's a legitimate interest that the State of New York  
3 and the state legislature was focused on, in the wake of  
4 George Floyd's death, and the City of New York was focused  
5 on the very same thing at the very same time.

6 JUDGE CANNATARO: Counsel, what I'm struggling  
7 with is my inability to differentiate between compressing  
8 the carotid artery and windpipe with compressing the  
9 diaphragm. I don't see a meaningful difference there, so  
10 if you could educate me about that.

11 MR. ENGEL: Sure. The difference is that the  
12 windpipe is right here, the diaphragm is a muscle that goes  
13 around the back of your spine. It is not - - - if you said  
14 pressing the stomach, compressing the stomach, that makes  
15 sense. Compressing the chest makes sense. But that's not  
16 what this law says.

17 JUDGE CANNATARO: You know that thing you just  
18 did with the windpipe? I didn't know that. I - - - I - -  
19 - I'm not joking. I really didn't know that that is where  
20 the windpipe is.

21 MR. ENGEL: But you could be trained.

22 JUDGE CANNATARO: You say that's legal.

23 MR. ENGEL: You could be trained at compressing a  
24 carotid artery or compressing a windpipe. It's right  
25 underneath the skin, and the law would be focused upon

1 where there is direct pressure applied. The problem here  
2 is that, compress the diaphragm, as the uncontradicted  
3 summary judgement record reflected below, with two medical  
4 experts, two police experts, it's an incomprehensible  
5 subject.

6 CHIEF JUDGE WILSON: So what about the police  
7 department's internal instructions to officers about how to  
8 avoid compressing the diaphragm? Basically turn the person  
9 over, that sort of thing.

10 MR. ENGEL: Yes. So the traditional advice has  
11 focused upon, where feasible, not sitting or standing, and  
12 as soon as practical, turning the arrestee over,  
13 recognizing the risk of positional asphyxia. But the NYPD  
14 has never had a categorical rule that an officer has  
15 violated the policy, if in the course of a struggle, she's  
16 wrestling with the detainee and there is some pressure of a  
17 knee, or otherwise, placed upon the detainee. The goal is  
18 a safe, lawful arrest.

19 CHIEF JUDGE WILSON: Well, you would have a  
20 justification defense in the circumstance you're  
21 describing, right?

22 MR. ENGEL: No question that their justification  
23 defense would apply. At the same time, a police officer  
24 dealing with this dangerous situation is entitled to fair  
25 notice of the prohibition. The city chose a phrase that's

1 fundamentally indeterminate.

2 JUDGE HALLIGAN: And is that - - - is that  
3 because you think the diaphragm is too big, or because they  
4 can't know where it is, or they can't know when it's  
5 compressed?

6 MR. ENGEL: As Dr. Oppenheimer said, it's not a  
7 compressible muscle. It - - - it's just not - - - it's not  
8 something that one compresses. The diaphragm goes in and  
9 out itself in the back, you know, in running around into  
10 the back. But what they're trying to get at here - - -  
11 they're trying to - - - they're getting at interference  
12 with breathing, right? That's what they're concerned  
13 about. But compress the - - - you can interfere with  
14 breathing without putting pressure on the diaphragm - - -

15 JUDGE CANNATARO: So is the problem that there's  
16 a lack of precision, physiological precision, to the  
17 language with respect to the diaphragm?

18 MR. ENGEL: Yes, there's a problem that it is - -  
19 - it is medically, scientifically, plain language  
20 meaningless, and this is a criminal statute directed at  
21 officers. There is not a mens rea requirement. There is  
22 not an injury requirement as well.

23 JUDGE HALLIGAN: Is it in - - -

24 JUDGE RIVERA: Go ahead - - - go - - - go.

25 JUDGE HALLIGAN: Is it incomprehensible as in, I

1 can't understand it? Or is it medically impossible, as in  
2 you can't physically do it because that muscle can't be  
3 compressed?

4 MR. ENGEL: An officer cannot know whether or  
5 when, you know, he or she is violating this statute,  
6 compressing it.

7 JUDGE CANNATARO: No, but you - - - you said a  
8 moment ago that the diaphragm cannot be compressed. You've  
9 made it sound almost as if there's no way to violate this  
10 provision.

11 MR. ENGEL: If - - if - - - if someone's  
12 diaphragm were removed from the body and placed upon this  
13 table, one could compress the diaphragm. But in the course  
14 of the body, it's protected in the ribcage. The ribcage  
15 surrounds it. It is not lying just against the skin and is  
16 very difficult to put - - -

17 JUDGE HALLIGAN: So why isn't the answer then,  
18 not that it's vague, but that it can't be to Judge  
19 Cannataro's point, it can't be violated?

20 MR. ENGEL: Well, I - - - I think that the  
21 problem is that there's just no - - - I mean, it may have  
22 difficulty, you know, the DA may have difficulty bringing a  
23 prosecution, but as to the officer whose being asked, in  
24 the course of the struggle, whether or when it's violated,  
25 that's - - - that's a problem. There is no fair notice and

1           therein. The precedents - - - and you asked, Judge, about  
2           what cases are we talking about. I read the vagueness  
3           cases starting with the Colautti at the US Supreme Court,  
4           also Gold and New York Traprock, to say that you cannot  
5           have a prohibition on actions that the person taking those  
6           actions doesn't depend on the unknowable effects upon a  
7           third party, whether it's the third party's body, in this  
8           case, or whether someone is annoyed or whether someone can  
9           hear, you know, can hear noise.

10                   JUDGE RIVERA: So let me ask you this. So - - -  
11           it's following up on these questions. If - - - if - - - if  
12           you can't compress, it's a muscle that cannot be  
13           compressed, what can be done to the diaphragm?

14                   MR. ENGEL: Again, I mean I - - - I - - - I don't  
15           think that actually, given that it's within the ribcage and  
16           that it's kind of internal in the body - - -

17                   JUDGE RIVERA: Yeah.

18                   MR. ENGEL: - - - it's very difficult - - -

19                   JUDGE RIVERA: It's completely encased is your  
20           point. It's completely encased.

21                   MR. ENGEL: It's completely encased, and  
22           therefore, if the city or the state wanted to focus on the  
23           risks of interfering with someone's breathing, a statute  
24           that focused upon whether or not someone could breathe,  
25           whether there is a knowledge requirement, whether there's

1 an injury requirement, would be - - -

2 JUDGE RIVERA: So - - - so - - - so when someone  
3 puts their knee on your chest, what is interfering with the  
4 breathing? If it's not - - - I get your point. You're  
5 saying it's not because you are putting pressure on the  
6 diaphragm, what - - - it - - - because you're not on the  
7 windpipe, then what is it?

8 MR. ENGEL: I mean - - - I - - - again, I'm not a  
9 medical expert, but what you're talking about is you're - -  
10 - you're interfering with the ability of someone to  
11 breathe. It is interfering with the entire breathing  
12 system.

13 JUDGE RIVERA: And you're saying that's unrelated  
14 to pressure on a diaphragm.

15 MR. ENGEL: Well, it may or may not involve  
16 pressure on the - - - I mean it's not literally pressure on  
17 the diaphragm. It's interfering with the diaphragm's  
18 ability to power the respiratory system, but that of course  
19 is not the standard; that's not what's in this statute.  
20 And, you know, and if it was a situation in which an  
21 officer knows that he or she is interfering - - -

22 JUDGE RIVERA: So if they wrote - - - if they  
23 wrote - - - if they wrote - - -

24 MR. ENGEL: No. Oh, I'm sorry.

25 JUDGE RIVERA: If they wrote, which otherwise

1           interferes with the diaphragm, would that have worked as  
2           opposed to compression? If you're saying compression is  
3           not something that can be done.

4                   MR. ENGEL: I'm saying if an officer knows they  
5           are interfering with the operation of someone's breathing  
6           or with the operation of someone's diaphragm, that would be  
7           a better statute. That - - - we may not be here on - - -  
8           on vagueness.

9                   JUDGE RIVERA: How - - - how would they know  
10          that? You're saying they can't know what compression is,  
11          but you're really saying you can't compress a diaphragm.

12                   MR. ENGEL: Compression doesn't make any sense.  
13          The diaphragm is not being compressed here. And if I may  
14          say a word on pre-emption, which I think - - - there's been  
15          a lot of talk starting with Justice Love on - - - on the  
16          vagueness issue.

17                   But - - - but this is - - - this is the only case  
18          that I'm aware of in which a municipality revisited the  
19          judgement of a state only one week after. You know, and  
20          there's - - - there's no - - - there's no other precedents  
21          here. I mean - - -

22                   CHIEF JUDGE WILSON: Well, they've been working  
23          on this long before, right?

24                   MR. ENGEL: Well, both the legislature and the  
25          city had been working on - - -

1 CHIEF JUDGE WILSON: Yeah, but I guess I'm  
2 quibbling with the word, revisit, I guess.

3 MR. ENGEL: But - - - but - - - literally - - -  
4 in the wake of George Floyd - - -

5 CHIEF JUDGE WILSON: Yeah.

6 MR. ENGEL: - - - the state legislature and the  
7 legislative history is - - - is, you know, completely clear  
8 here, was focused on the problems with Eric Garner, with  
9 George Floyd, with the risks of asphyxia in connection with  
10 an arrest. And they went back and forth and came up with a  
11 statute that addressed intentional obstructions of airflow  
12 that result in serious injury. You know, that's the Eric  
13 Garner Act of the state. The city revisited - - -  
14 essentially revisited that judgement and made a different  
15 decision.

16 CHIEF JUDGE WILSON: No, they were both visiting  
17 - - - they were both visiting the judgement at the same  
18 time and they, you know, unless you're arguing that they  
19 didn't have the ability to do that, I'm not sure where your  
20 argument is.

21 MR. ENGEL: Well - - - well, I think - - - I  
22 think I am arguing that where the state has pervasively  
23 regulated the issue of law enforcement arrests - - -

24 CHIEF JUDGE WILSON: That doesn't matter. That  
25 doesn't make a difference who came first.

1 MR. ENGEL: Well, it doesn't necessarily, but  
2 typically, where - - - typically, when we're dealing with  
3 preemption cases, we're wondering what is the state's  
4 intent, either explicitly or implicitly, and is the city  
5 filling the gaps, are they going orthogonal to something  
6 that the state was thinking about. Most of these cases  
7 happen several years later and then the question is, is the  
8 law that the legislature put on the books? Does that have  
9 a preemptive effect on what the municipality is seeking to  
10 do? But - - - but here, you know, we're in a situation  
11 and, you know, where this is literally the same issue at  
12 the same time, and the city is doing a very different  
13 judgement.

14 JUDGE SINGAS: Can I ask, what is the exact field  
15 that you're saying is preempted? Lawful arrests, or  
16 arrests and breathing? What's the exact field?

17 MR. ENGEL: At a minimum, I would say the risks  
18 of asphyxia in the connection with breathing. But there is  
19 a pervasive web of state laws regarding law enforcement  
20 arrests. Both the arrest authority, the who, what, when,  
21 where of arrests, as well as the use of force, and there is  
22 actually no precedent for this city law.

23 JUDGE HALLIGAN: So are you saying that - - -  
24 that the entire array of issues around arrests are now  
25 field preempted and localities can do nothing?

1 MR. ENGEL: So I would - - - I would say - - - I  
2 would say two things. One I would say, on this case all  
3 that is necessary is to say that the risks of asphyxia in  
4 connection with an arrest was specifically addressed by the  
5 legislature.

6 JUDGE HALLIGAN: That's a very narrow field then.

7 MR. ENGEL: I mean that - - - that could - - -  
8 that could be a narrow field. I do - - - but I do think  
9 there is no other New York City law that has a criminal - -  
10 - as a matter of criminal prohibition, regulates arrests.  
11 And many law enforcement officers operate throughout the  
12 state, whether it's the MTA, or the Port Authority, or the  
13 New York State Troopers, you know, or the like, and so it  
14 does make sense that this would be regulated on a statewide  
15 basis, and this wouldn't be limited to just municipality by  
16 municipality.

17 Some of Mr. Cole's clients are from adjoining  
18 counties who are now afraid to send their law enforcement  
19 officers into the city because of the risk of this law.  
20 And so I think there is a narrow basis for field preemption  
21 here. I think you could also describe it as conflict  
22 preemption. I - - - but I think - - - but the reality of  
23 the situation here is that there is a real field of arrest  
24 in which the criminal procedure code does the circumstances  
25 of arrest. It also addresses the use of force. There is

1 the justification defense, which is a state defense, and  
2 then there's specifically, the general penal code in this  
3 area. And so the idea that the city is talking about the  
4 very same issues, at the very same time, reached a very  
5 different judgement from the state, which was much more  
6 balanced if you read - - - if you look at the legislative  
7 history which, you know, we - - -

8 JUDGE TROUTMAN: So what rights do municipalities  
9 have with respect to their own enactments?

10 MR. ENGEL: Well, I - - - I mean - - - so I think  
11 specifically, with respect to risks of asphyxia, I don't  
12 think they have that right. Clearly, the city - - -

13 JUDGE TROUTMAN: But in the other areas that  
14 affect the penal law, do they have rights?

15 MR. ENGEL: Well - - - well, I - - - the - - -  
16 the local penal laws, sure. I mean, that's not - - -  
17 that's not covered. But traditionally, what New York City  
18 has done - - -

19 CHIEF JUDGE WILSON: So the - - - put the city  
20 council aside. Could the police department, as a matter of  
21 internal policy, make rules preventing kneeling and  
22 standing and so on?

23 MR. ENGEL: I - - - and - - - and you know, they  
24 have. The - - - the police - - - yeah, yes, is the answer.  
25 I mean, the - - - I mean, look, the New York City, as an

1 employer has - - -

2 CHIEF JUDGE WILSON: So that's seems - - - yeah,  
3 okay.

4 MR. ENGEL: That's the distinction I would draw,  
5 Your Honor. New York City, as an employer, has an array of  
6 laws and procedures, some of which are, you know, in the  
7 code itself, which governs the conduct of officers on the  
8 job. There's no question about that. What's new here is a  
9 criminal law directed at police officers in an area that  
10 has traditionally been regulated by the state and not even  
11 traditionally, but in this specific instance, this very  
12 issue was addressed by the state, so that - - - you know,  
13 by the - - - by the state.

14 So that's - - - you know, I think that this is -  
15 - - there has never been another case in which the state  
16 and the municipality were addressing the issue at the same  
17 time, and you know, I would just point out that the  
18 Lansdown Entertainment is - - - I was looking at this  
19 court's precedence on preemption. You know, this was a  
20 case was about closing times for nightclubs. And Lansdown  
21 Entertainment, the city said we want the Limelight club to  
22 close at four and the - - - and the state had a law that  
23 said that the alcohol beverages control law said you can be  
24 open til 4:30. Now you could comply with both of those  
25 laws just by closing at 4 o'clock. This court said no,



1 this is - - - this is preempted. The city cannot add on  
2 additional layers of an issue that the state has expressly  
3 addressed. And similarly, you know, that's what we're  
4 dealing with - - - we're dealing with here.

5 CHIEF JUDGE WILSON: Thank you.

6 MR. ENGEL: Thank you.

7 MR. DEARING: May it please the court. Richard  
8 Dearing for the City. Let's start on vagueness. I think  
9 the - - - it's pretty simple, actually. Compresses the  
10 diaphragm, don't compress the diaphragm means don't put  
11 pressure on the diaphragm as the court - - - as many of the  
12 court's questions reflect. It's a plain - - -

13 JUDGE TROUTMAN: Is mathematical precision  
14 required?

15 MR. DEARING: Absolutely not. This court has  
16 said that multiple times, and I think that's a key point,  
17 because the premise really, of most of the argument from  
18 the Plaintiffs here, is you have to be able to know exactly  
19 when your - - - you know, if I move six inches over, I  
20 might not be in violation, but six inches here I am. You  
21 have to be able to make that differentiation. The cases  
22 repeatedly reject that kind of thinking. You know, where  
23 Plaintiffs say that we and the First Department are  
24 rewriting the statute, I think they're misunderstanding  
25 what's happening. We're not rewriting the statute.

1 JUDGE GARCIA: Reading the statute, Counsel, do  
2 you read in a manner that restricts airflow to apply to  
3 kneeling, sitting, and et cetera?

4 MR. DEARING: I do read it that way, that it - -  
5 - that it applies to both aspects. I - - - I - - - I would  
6 say though, that if the court - - - you know, if the court  
7 believes there's another way to construe it, and that way  
8 would save the statute were it any risk, the court would  
9 have an obligation to do that rather than strike it down.

10 I think the key point from the First Department  
11 and us is that - - - is that as a matter - - - that as a  
12 practical matter, an officer can know when they're applying  
13 body weight pressure in the vicinity of the diaphragm, to  
14 the external, exterior of the body, and know they're  
15 therefore, in jeopardy of violating the statute. There's a  
16 number of DWI cases from all across the country that make  
17 this exact point. A lot of people don't know when they're  
18 over the limit. Some states, the limit doesn't even apply  
19 until hours after you drive. And the courts have  
20 consistently rejected the idea that that makes the statutes  
21 vague. Same is true of noise statutes - - -

22 JUDGE RIVERA: But why not just have written, put  
23 pressure on the diaphragm? I don't know that that would  
24 have kept them at bay, but nevertheless.

25 MR. ENGEL: I would - - - I would suspect not,



1 but I - - - I do think that's, in substance, what - - -  
2 what the statute says, compress - - - but don't compress  
3 the diaphragm means don't put pressure on the diaphragm.  
4 And if you want to see what that looks like, there's a - -  
5 - there's a video from Commissioner Bratton who really  
6 inaugurated the PD's policies in this area. There's a  
7 pictorial representation of what happens inside the body  
8 when pressure is put.

9 JUDGE RIVERA: Well here's - - - here's my  
10 problem. Aren't we on this kind of challenge that's  
11 limited to the four corners of - - -

12 MR. DEARING: I don't think so, because we're - -  
13 - we're here to - - -

14 JUDGE RIVERA: - - - which chosen, we can't look  
15 to somehow important definitions or understandings?

16 MR. DEARING: No, I don't think - - - we're  
17 talking about an exercise in construction. The meaning  
18 comes from the dictionary, I think. To compress means to  
19 put pressure on diaphragm, we know what that means. You  
20 put them together, we understand what that is. I'm saying  
21 - - - if you want to - - - if you want to see what it looks  
22 like, because we've heard some things about it - - - it's  
23 supposed impossibility, which I do think would be an  
24 argument that goes more to the question whether it can be  
25 violated than whether it's vague.

1                   But the Bratton video shows you that, and I'll  
2 tell that the medical examiner says this, describes this  
3 and you'll see a illustration that shows it happening when  
4 pressure is put on the back, in the abdomen area, raises  
5 the abdominal contents, pushes up into the diaphragm and  
6 makes it more difficult for the diaphragm to contract. And  
7 there's a pictorial representation of how that happens.

8                   We cited two cases, page 478 of the record, where  
9 courts described that exact phenomenon themselves. You - -  
10 - you pinned a person down; the officers did cause his  
11 abdomen to be pushed into his upper chest and interfered  
12 with the movement of the diaphragm. Another case, his  
13 diaphragm can't move because his abdomen is on the bed  
14 being pinned down. So we have - - - we have cases in this  
15 record that describe that. We have the Bratton video that  
16 demonstrates it and shows a picture of it. I think we know  
17 exactly what it looks like when this statute is violated.

18                   JUDGE CANNATARO: Counsel, based on your answer  
19 to Judge Garcia's question about how you read the various  
20 clauses, specifically, your answer with respect to  
21 restricting blood and air, if there were a problem with  
22 the, so as to compress the diaphragm, section, a vagueness  
23 issue with that, I imagine that means you could excise that  
24 section from the statute and still have the sitting,  
25 kneeling, standing provision survive, is that correct?

1 MR. DEARING: I think you could do that. You  
2 could alternatively construe the phrase, compresses the  
3 diaphragm, if you thought it would benefit from  
4 construction. There are many options available to you. I  
5 think the thing that is - - - is absolutely not established  
6 here is that the Plaintiffs have overcome the strong  
7 presumption of validity - - -

8 JUDGE HALLIGAN: So what's the line, though,  
9 between construing it, so that it has some clear meaning,  
10 and remedying or rewriting a vague statute?

11 MR. DEARING: I mean, I - - - I - - - I have two  
12 responses to that. I - - - I think, the first is, you can  
13 engage in an exercise of construction like any other  
14 exercise of construction. I would submit the exer - - -  
15 which you do with many criminal statutes. We have a number  
16 of cases from this court where this court has done  
17 precisely that, sometimes over dissent. I mean, there's -  
18 - - there are meaty construction issues around criminal  
19 statutes. We can engage in that exercise. I actually  
20 think it's a pretty short exercise, because we're relying  
21 on the ordinary meaning, the dictionary meaning of these  
22 words, which is pretty straightforward.

23 There is a second layer, which is if - - - if - -  
24 - if the court believes the statute is in peril, I don't  
25 think this statute is in any peril under an appropriate

1           vagueness standard once it's construed. If it is in any  
2           peril, the obligation of the court is to identify whether  
3           there's - - - it is susceptible of any construction that  
4           would save it. And - - - and I - - - the line - - - the  
5           outer line on rewriting the statute, which this court has  
6           expressed in a few different cases, is - - - is it not  
7           fairly susceptible of any construction under which it would  
8           be valid.

9                         JUDGE CANNATARO: Short of having an encyclopedic  
10           knowledge of anatomy, what is it about that section that is  
11           susceptible to a fair construction? Is it just restricting  
12           breathing so that a person can't breathe, or is it  
13           something else?

14                        MR. DEARING: I think the whole thing is  
15           susceptible to a fair construction and here's what it'd be.  
16           We restrict airflow - - - I think - - - I think we have  
17           agreement that that's not vague - - - or difficult to  
18           understand. Sitting, standing, kneeling on a back or  
19           chest, that's pretty straightforward. In a manner that  
20           compresses the diaphragm, that means in a manner that would  
21           put pressure on the diaphragm in a way that I just  
22           described. That's a very straightforward dictionary  
23           reading of the words. It's not even that hard of an  
24           exercise of construction, and it - - - and it is clearly  
25           not vague.

1           The Oppenheimer - - - I think the flaw in the  
2           Oppenheimer Declaration, the doctor's declaration, is to  
3           treat this as if it were a medical term. But it doesn't  
4           purport to be a medical term. It is just a plain language  
5           description in a statute that's directed at police  
6           officers, not at physicians. And even in that - - - even  
7           in that declaration - - -

8           JUDGE SINGAS: Then why use the word diaphragm if  
9           it's - - - if it's geared towards common, you know, a  
10          common police officer that doesn't have that anatomical  
11          encyclopedic knowledge? Why not say the chest or the  
12          vicinity of the chest? I mean, it's - - - it's hard to say  
13          you can use the ordinary dictionary meaning of compress and  
14          then the ordinary meaning of diaphragm when most people  
15          don't even know where the diaphragm is.

16          MR. DEARING: Well, the statute also refers to  
17          the windpipe, also refers to the carotid artery. These are  
18          - - - these are not, I don't think, essentially medical  
19          terms. They're just plain language descriptions of parts  
20          of the body. The line I would draw, though, is there's a  
21          difference. These are not - - - these are police officers  
22          who are trained, specifically, on basic anatomy; they're  
23          not physicians. So what I think the daylight here is, it's  
24          not a statute that is designed to be read in a medical  
25          sense. It's not a direction to physicians the way the Cola

1 - - - the statute that was at issue in the Colautti case  
2 was. But it - - - but it does use terms of anatomy just  
3 like the state chokehold law uses that they don't object  
4 to, just like the portion of this law about the chokehold  
5 uses portions of the anatomy because the statute is, in  
6 part, about vulnerable parts of the human anatomy that lead  
7 to serious injury or death when they're mishandled, or when  
8 force is applied by police officers.

9 JUDGE CANNATARO: Counsel - - -

10 JUDGE GARCIA: I'm sorry. To just explore that  
11 point a little bit. It is a statute aimed at a very  
12 particular audience, right? It's not the general public.  
13 Now I think training for a particular police force only  
14 gets you really so far because it applies to any - - - as  
15 you're - - - want to say it applies to any law - - - law  
16 enforcement officer that comes in the jurisdiction, right?  
17 So it could be a trooper, it could be MTA, whoever. But  
18 how do we factor in that audience in the analysis of  
19 vagueness?

20 MR. DEARING: I think - - - I think that the - -  
21 - it factors in favor of giving, I think, wider berth to  
22 the statute and that's true in two ways. The first one,  
23 which I think is most directly responsive to your question,  
24 is kind of an analogy to the doctrine you see about  
25 statutes that are directed at businesses that says they

1 have the opportunity to review the statute, understand what  
2 it means, and sort of develop a plan for how they comply.  
3 And the same is true in the case of police officers and  
4 police forces and was done by the NYPD here. And I will  
5 say, it's not just the NYPD. Police forces across the  
6 country, largely as a result of Commissioner Bratton's  
7 efforts in the mid-90s, train their - - - their officers  
8 about compression asphyxia, compression restraint, et  
9 cetera, et cetera.

10 The second way that I think it matters, is  
11 because a - - - a - - - a key question in vagueness laws,  
12 especially when you're - - - when you're looking at the  
13 possibility that someone might have to sort of give some  
14 degree of berth, you know, around violating the statute, is  
15 whether that - - - whether there's the underlying conduct  
16 implicates constitutional rights, because there is  
17 particular concern in vagueness law for statutes that would  
18 shield the exercise of legitimate constitutional rights.  
19 And here we don't have that either. We don't have the - -  
20 - this conduct of police officers implicating any  
21 constitutional right, other, potentially than the victims  
22 who are being arrested, who are being injured, who are  
23 being killed by these tactics.

24 I just would close - - - well, I would make one  
25 more point on vagueness, which just to round out the list I

1           tried to give about DWI, noise, we have an assault weapons  
2           statute, we have child pornography statutes, we have online  
3           gambling statutes. A variety of courts have said that the  
4           - - - that the argument that I can't know precisely when  
5           I'm violating the statute, when I know that I'm in the  
6           clear zone of violating it, that does not state a valid  
7           vagueness objection.

8                         And I just would - - - I'm happy to answer any  
9           other questions on vagueness. If not, I just want to touch  
10          very briefly on the preemption question.

11                        This is a very simple preemption case. There are  
12          not really examples. The - - - my friends are citing cases  
13          where the - - - where the state has given forms of license  
14          for permission to certain kinds of businesses. And there's  
15          a question in those kinds of cases, whether a locality may  
16          have latitude to vary that license. But there really  
17          aren't cases, other than one which is quite different,  
18          where a state level prohibition has been understood to  
19          preempt locality.

20                        JUDGE TROUTMAN: What about their argument that  
21          because law enforcement are able to effectuate arrests  
22          across jurisdictional lines that they need one, clear  
23          standard?

24                        MR. DEARING: I think if the legislature had said  
25          that, at any point, we might be having a different

1 conversation. But it - - - the preemption isn't determined  
2 by sort of speculation in the air about why uniformity  
3 might matter. This court looks for specific evidence that  
4 the legislature has made that judgement. And the best  
5 example I can give you, and it's particularly pertinent on  
6 field preemption - - - or any preemption - - - from Garcia,  
7 the court said, it's only when the state specifically  
8 permits the conduct prohibited at the local level where  
9 there is some other indication that deviation from state  
10 law is prohibited that preemption occurs. And there are -  
11 - - the cases that plaintiffs are rely - - - have relied  
12 most on, cases like Con Ed, cases like Diack. There are -  
13 - - the record in those cases, and the court's opinion in  
14 those cases, list numerous pieces of evidence, either from  
15 the legislature or the Governor, that said we need a  
16 comprehensive state level scheme. We need to replace an  
17 uncoordinated welter of state and local approvals with a  
18 one-stop shop at the state board for citing power plants.  
19 You see evidence of that. What you don't see is litigants  
20 coming up and saying, I think uniformity would be a good  
21 idea and attributing that intention to the legislature, and  
22 thereby, displacing the home rule authority.

23 JUDGE CANNATARO: Counsel, I presume this  
24 provision would apply to all law enforcement officers in  
25 New York City, not just NYPD, right?

1 MR. DEARING: That is correct.

2 JUDGE CANNATARO: Okay. If a Sheriff were to  
3 effect an arrest - - - it would apply equally to them,  
4 would it not?

5 MR. DEARING: That is - - - that is correct.

6 JUDGE CANNATARO: This issue about their  
7 knowledge, the specialized audience, the training they  
8 have, do you have any concerns that maybe those other law  
9 enforcement officers are not adequately trained to - - - to  
10 understand what this statute means?

11 MR. DEARING: No I - - - I don't think so,  
12 because I think - - - the point about training is less, I  
13 think, that the specific evidence of training on this  
14 statute, but just a - - - just a practice of training on  
15 tactics to effect arrests safely, where there are laws that  
16 are pertinent to those tactics, to tell officers what those  
17 laws are and how to prudently avoid violating them. That  
18 is - - - that is done by the PD. I'd submit it's done by  
19 police forces all over the place.

20 And - - - and - - - and the last thing I'd say is  
21 the idea that - - - this kind of idea that we, like, need a  
22 cooling off period in the city before we can act, like, if  
23 we act too close - - - there's an issue that's so  
24 significant and gets attention at two levels simultaneously  
25 and that - - - I mean, I - - - to me, it's just made up.

1 It's also quite counterintuitive. What we have here is the  
2 Eric Garner incident, in New York City in 2014, profoundly  
3 affected the City of New York. The George Floyd incident,  
4 2020, unleashed protests - - - historic protests in the  
5 City of New York and other places. The idea - - - the  
6 record here shows dozens of people came in and testified  
7 before the city council. The community - - - communities  
8 in New York City felt deeply about what was going on and  
9 this law. The idea that there would be this idea that it's  
10 sort of too important, that - - - that if the state's  
11 looking at it now, if it's too topical, if it's too timely,  
12 you know, the city has to take a back seat, has to chill  
13 out, has to wait and maybe come back in five years.  
14 There's no law that says it, it's - - - I would submit it's  
15 not consistent with the idea of home rule in New York  
16 State, and it would mean that you cut off political  
17 engagement, local engagement in the City of New York in  
18 ways that are - - - that are unwarranted and - - - and  
19 undesirable.

20 CHIEF JUDGE WILSON: Thank you.

21 MR. COLES: Thank you, Your Honors. I just want  
22 to start quickly coming back to Justice Rivera's question,  
23 because I want to make sure that we're on the same page on  
24 that.

25 As you asked, can you be putting pressure and



1 interfering with breathing without putting pressure on the  
2 diaphragm or compressing the diaphragm? And the answer to  
3 that, it is in the record, and the answer is, yes you can.  
4 You can compress the lungs, you can compress the chest, and  
5 as I mentioned earlier, someone might even be out of  
6 breath. There are many reasons during an arrest,  
7 particularly a resistant situation, where breath - - -  
8 breathing may be impaired. The problem here is, you can't  
9 tell that it has anything to do with compression of the  
10 diaphragm.

11 And I couldn't agree - - - disagree more with  
12 what my colleague said about not rewriting the statute.  
13 The statute says you go to jail for a year, potentially, if  
14 during an arrest you compress the diaphragm. And he's  
15 saying, don't worry about that. You know, if you put  
16 pressure on the diaphragm, if you interfere with breathing,  
17 no, we're strictly construing a criminal statute. The  
18 city's council chose the word, compress. That word in  
19 combination with diaphragm does not give fair notice of  
20 when it happens. It is not a term in common usage. I  
21 don't think - - - I've never seen a statute that used the  
22 word, compress the diaphragm, before. It's clearly a  
23 technical term.

24 JUDGE RIVERA: Can we look to the dictionary?

25 MR. COLES: You can look to the dictionary, but

1 it will give you the definition of compress and diaphragm.  
 2 It doesn't tell you how to know when the diaphragm is  
 3 compressed. So looking to the dictionary doesn't solve the  
 4 problem. And - - - and - - - and the - - - and the idea  
 5 that you could actually, sort of, change the statute in - -  
 6 - in - - - in these, sort of, gross ways that the city was  
 7 talking about and not call that rewriting a statute, makes  
 8 no sense at all. They're actually writing - - - they're  
 9 rewriting what the city council said. Even the Appellate  
 10 Division changed what the city council said, and that's  
 11 because this is fundamentally just a flawed law. It needs  
 12 to go back. And recon - - - I just - - - just - - - and -  
 13 - -

14 JUDGE RIVERA: What if it's the - - - in a manner  
 15 that places pressure on the diaphragm. Would that have  
 16 saved it?

17 MR. COLES: The - - - the - - - the - - - that is  
 18 a different statute. And you have to have hearings on  
 19 that, and you have to figure out what pressure on the  
 20 diaphragm means and what the doctors say about that. But  
 21 that's not this statute. And to say that you can send  
 22 someone to jail just by changing a couple of words when the  
 23 city council chose the word - - - the word compress, and  
 24 you can't prove that. You can't know that as a cop. That  
 25 there's a - - -

1 CHIEF JUDGE WILSON: I thought that - - - you  
2 know, I thought that you were going to answer Judge  
3 Rivera's question by saying that wouldn't improve the  
4 statute at all because of an officer can't know whether he  
5 or she is putting pressure on the diaphragm any more than  
6 they could know that - - -

7 MR. COLES: I think the city council might  
8 actually come to that conclusion.

9 CHIEF JUDGE WILSON: Well, I was asking about  
10 your conclusion, actually. I think that's what Judge  
11 Rivera was asking about.

12 MR. COLES: I - - - I - - - well, based on the  
13 record and my conclusion - - - based on the record, an  
14 officer effectuating an arrest cannot tell what is  
15 happening with the diaphragm.

16 CHIEF JUDGE WILSON: Whether it's being  
17 compressed or whether pressure is being put on it.

18 MR. COLES: Yes, or - - - or whether - - - or  
19 whether or not it's being interfered with - - - the  
20 operation which is different than compression.

21 If - - - if I could just make one - - - one - - -  
22 one - - - one last thing - - - to just be - - - the Bratton  
23 video, which is a 1994 hearsay video that is really not  
24 part of the record, but even if it is, it actually makes  
25 our point. It does not explain how the diaphragm is

1 compressed or if the diaphragm is compressed. It  
2 specifically talks about - - - Dr. Hirsch talks about  
3 compressing the abdomen, which is actually something you  
4 can see. The - - - there's no discussion in that video  
5 about compressing the diaphragm.

6 JUDGE CANNATARO: I got the impression from  
7 reading your adversary's brief that the bottom line of the  
8 Bratton video is, don't sit, kneel, or stand on a person's  
9 chest or back.

10 MR. COLES: And that's the argument that the city  
11 made to the trial court. And the trial court said, well,  
12 if that's - - - if that's the law that the city council  
13 wants to pass, then they can actually consider that and  
14 decide if they want to do that. It's not what the law says  
15 now.

16 As I said at the beginning, the law allows you to  
17 sit, kneel, or stand, even impair breathing, so long as you  
18 don't compress the diaphragm. But you don't know how the  
19 diaphragm is compressed.

20 And - - - and - - - and the last point - - - and  
21 I know this is in the briefs, but, you know, the people who  
22 passed this law didn't know what it meant. Chairman  
23 Richards of the Public Safety Committee said, well, we left  
24 that a little vague. The speaker, at the time, said it was  
25 subjective, not clear. And even the mayor at the time,

1 Mayor de Blasio, said the - - - said the diaphragm  
2 provision needs a little bit of clarification.

3 I would ask you, if the people who wrote and  
4 passed the laws themselves don't know what it means, how  
5 can you ask a police officer, in the middle of an arrest  
6 situation, to figure it out himself.

7 CHIEF JUDGE WILSON: Thank you.

8 MR. COLES: Thank you very much, Your Honors.

9 MR. ENGEL: Thank you, Your Honor.

10 Picking up from that, I - - - I - - - I heard my  
11 friend say that this is like an economic regulation in that  
12 because it focuses on a potentially trained office at the  
13 NYPD, putting aside that other law enforcement officers may  
14 not be trained with the NYPD, we can tolerate a certain  
15 degree of ambiguity. That really puts the presumption on  
16 its head. I mean, in other areas of the law, like the  
17 Fourth Amendment and the like, the U.S. Supreme Court has  
18 been crystal clear. Cases like *Graham v. Conner* and the  
19 like, that we're depending upon officers to make split  
20 second judgements in dangerous situations. And the law  
21 doesn't impose a higher standard on temporary misjudgments  
22 or the like; it actually, you know, it needs to take into  
23 account reasonableness. And of course, that's the same  
24 thing that the justification defense under Penal Law 35.30  
25 says.

1 JUDGE RIVERA: Can you rely on dictionaries?

2 MR. ENGEL: Can you rely on dictionaries? Of  
3 course.

4 JUDGE RIVERA: Sure.

5 MR. ENGEL: Of course, you can.

6 JUDGE RIVERA: So if there's a definition for  
7 compress, can you just swap it?

8 MR. ENGEL: Well, I think that - - -

9 JUDGE RIVERA: Will that resolve the problem?

10 MR. ENGEL: No, Your Honor, because, compress the  
11 diaphragm, is just not a phrase that an officer can know  
12 whether or not he or she is complying with.

13 JUDGE SINGAS: How does that uncertainty lead to  
14 arbitrary enforcement? Because it seems pretty clear to me  
15 what you can and cannot do.

16 MR. ENGEL: See - - - see - - - I - - - I think  
17 it actually - - - it leads exactly to arbitrary enforcement  
18 because - - - precisely because people kind of know what  
19 we're getting at, but the law - - - but many people may  
20 violate the law, but they're not the ones we're getting at.  
21 You have a situation in which the prosecutors are going to  
22 - - - are going to pick their targets. And there is going  
23 to be a diaphragm cop someday if this court doesn't act,  
24 who is charged with - - - who is charged with this, and  
25 many other people are not. And that's why we want clear

1 laws, because we want neutral administration of the law,  
2 and if there is a prohibition, it applies to everyone, not  
3 just some people.

4 JUDGE TROUTMAN: Is - - - is that what happened  
5 when it was a prohibition in the employment, that the city  
6 prohibited it in the employment relationship without the  
7 law? And sometimes it was enforced but some argue not - -  
8 - there were no real penalties.

9 MR. ENGEL: No, I think what happened is that the  
10 - - - the penalties were penalties for assault, penalties  
11 in, you know, extreme cases for manslaughter, and the like.  
12 There were criminal laws that regulated unreasonable force.  
13 And what the policies were - - - and this is in the Bratton  
14 video, this is, you know, elsewhere - - - the policies were  
15 don't do it where possible, where practicable. I mean this  
16 is - - - I mean - - - I haven't seen the Bratton video  
17 myself. It appeared for the first time in their brief, but  
18 even reading what they said, it says, turn people over onto  
19 their side as soon as possible. And you know, so there - -  
20 - there is an understanding there that it's not a black and  
21 white law where you've actually violated a criminal law in  
22 this context.

23 It's - - - it's a situation which officers are  
24 entitled to make reasonable judgments, and where there are  
25 extreme cases, there are laws on the books and obviously

1           there is discipline, as well, at the NYPD. But there are  
2           laws for those cases in which the officers go beyond, the  
3           few cases, but the cases where they go beyond. There is  
4           assault, there is manslaughter. And there are other state  
5           penal laws, including aggravated strangulation, which just  
6           on the point of whether - - - we're not arguing for a  
7           cooling off period. All we're saying is we have two laws  
8           here that were considered at the exact same time on the  
9           same record, and just as the city considered this, the  
10          state considered it. And where the state has dealt with  
11          the problem, and where the state has come up with a  
12          balanced solution with an intent requirement, with an  
13          injury requirement, avoiding the meaningless phrase,  
14          compress the diaphragm. It's appropriate to conclude that  
15          the state rule governs and that every municipality doesn't  
16          get to prescribe a - - - a - - - a, you know, a web of  
17          other laws that fail to address, you know, that come up  
18          with a different solution on the problem addressed by the  
19          state.

20                           CHIEF JUDGE WILSON: Thank you.

21                           MR. ENGEL: Thank you.

22                           (Court is adjourned)



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C E R T I F I C A T I O N

I, Jacqueline H. Portillo, certify that the foregoing transcript of proceedings in the Court of Appeals of Police Benevolent Association v. City of New York, No. No. 82 was prepared using the required transcription



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3  
4 *Jacqueline Portillo*

5 Signature: \_\_\_\_\_

6  
7  
8 Agency Name: eScribers

9  
10 Address of Agency: 7227 North 16th Street  
11 Suite 207  
12 Phoenix, AZ 85020

13  
14 Date: October 26, 2023

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